ORIGINAL

NO. 83-5905

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JAN 19 1984

ERNEST FITZPATRICK, JR.,

Petitioner,

-v-

STATE OF FLORIDA,

Respondent.

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SUPREME COURT, U.S.

ON PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

QUESTION I

WHETHER THE FLORIDA SUPREME COURT APPLIED AN UNCONSTITUTIONALLY NARROW VIEW OF ITS FUNCTION AS A REVIEWING COURT, IN FAILING TO FIND MITIGATING CIRCUMSTANCES AFTER THE TRIAL COURT FOUND NONE TO EXIST.

QUESTION II

WHETHER THE FLORIDA SUPREME COURT, ON REVIEW OF PETITIONER'S DIRECT APPEAL, FAILED TO COMPARE PETITIONER'S CASE WITH OTHER FLORIDA CAPITAL CASES.

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OPINION BELOW

Petitioner's designation of the opinion below is correct and acceptable to respondent.

JURISDICTION

Petitioner's jurisdictional allegation is acceptable to respondent.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts the constitutional and statutory provisions involved as set forth on p. 1 on the petition for writ of certiorari.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts as found in the petition for writ of certiorari on p. 1.

REASONS FOR NOT GRANTING THE WRIT

ISSUE I

WHETHER THE FLORIDA SUPREME COURT APPLIED AN UNCONSTITUTIONALLY NARROW VIEW OF ITS FUNCTION AS A REVIEWING COURT, IN FAILING TO FIND MITIGATING CIRCUMSTANCES AFTER THE TRIAL COURT FOUND NONE TO EXIST.

Citing Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982), petitioner contends that the Florida Supreme Court committed an error of constitutional dimensions in failing to overturn the trial court's finding that a mitigating circumstance had not been shown to exist. Additionally, petitioner urges this Court to conclude that the Florida Supreme Court applied an incorrect standard of review by failing to overturn the lower court's finding.

Petitioner lists pages 3 and 4 of the trial court's sentencing order (Appendix E, pp. 22-23) in support of his conclusion that the trial court required the evidence of mental mitigation to rise to proof of a legal excuse from criminal liability. As can be seen from the relevant portions of the trial court's order produced here, the trial court did not err in this regard.

> (b) WHETHER THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.
>
> This mitigating circumstance does not exist. Defendant was in complete control of his behavior according to the doctors' and the defendant's testimony.
>
> (e) WHETHER THE DEFENDANT ACTED UNDER EXTREME DURRESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON.
>
> This mitigating circumstance is not present. Defendant was the sole planner and perpetrator of the crime and was not acting under duress or domination of another person.
>
> (f) WHETHER THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED.
>
> This mitigating circumstance does not exist. The defendant was fully aware of what he was doing, knew that it was wrong, and could conform his conduct to do right had he so desired. This finding is supported by testimony of the experts and the defendant.

The trial judge in Eddings stated that the evidence produced by defendant in mitigation was useful in explaining his actions but not in excusing the behavior. The requirement that the mental mitigation excuse the criminality of petitioner was never imposed by the trial court below, or the Supreme Court of Florida. In Quince v. State, 414 So.2d 185 (Fla. 1982), the Florida Supreme Court notes the distinction between evidence presented in mitigation of sentence and evidence presented to excuse criminal action.

> We are well aware that a defendant may be competent to stand trial, yet nevertheless receive the benefit of the mitigating factors involving diminished mental capacity.

Id. at 187.

While petitioner maintains that the trial court did not properly evaluate the evidence in mental mitigation, he further claims that the failure of the Florida Supreme Court to reweigh the evidence produced at the trial level, violated his constitutional rights.

After recounting the evidence presented by petitioner in his attempt to demonstrate an impaired emotional condition, the Florida Supreme Court stated:

> All his testimony was considered by both the jury and judge. That decision was theirs and not ours to make. Since there was nothing in the records to indicate that their conclusion or the methods followed in reaching them were improper, we accept their conclusion.

Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983), at 1078.

The Florida Supreme Court more clearly explained its review function in Smith v. State, 407 So.2d 894 (Fla. 1982). In Smith, appellant argued that the trial court erred in refusing to find the mitigating circumstance that appellant was under extreme mental or emotional disturbance or that his capacity to appreciate the criminality of his act was substantially impaired. The court cited to Huckaby v. State, 343 So.2d 99 (Fla.), cert. denied, 434 U.S. 920 (1977), a case in which the death sentence was reversed on appeal for the lower court's failure to find the

identical mitigating circumstance. The Smith court stated:

> While the situation in Huckaby warranted an invasion of the trial court's domain, such is not the case here. The trial court here did not ignore every aspect of the medical testimony regarding the appellant; rather, it found that the medical testimony simply did not compel application of a mitigating factor in sentencing. Unlike the court in Huckaby, the trial court did not improperly refuse to recognize certain mitigating circumstances; rather it considered the evidence presented regarding the defendant's mental state and then made its decision, which we are not to disturb unless absolutely required to do so.

Id. at 902.

The distinction, of course, is made between cases in which an appellant merely disagrees with the way the court gave the evidence of the mitigating circumstance, and those cases in which the Supreme Court is "absolutely required"(Smith, supra) to intervene to correct an impropriety.

This case presents the first situation. The petitioner claims that the evidence of mental impairment was presented but that the trial court improperly failed to find that the mitigating circumstance existed. In Lockett, supra, and Eddings, supra, the essential difference is that there was a refusal to consider the evidence as mitigation. Florida has perceived its review function correctly under the Florida statute, which was approved by this Court in Proffitt v. Florida, 428 U.S. 242 (1976). In Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), the court stated:

> Neither of our sentence review functions, it will be noted, involves weighing or evaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances.

Id. at 1331.

It is, therefore, clear that petitioner's allegation of violation of his constitutional rights is unfounded and this Court should refrain from granting his petition for writ of certiorari.

QUESTION II

WHETHER THE FLORIDA SUPREME COURT, ON REVIEW OF PETITIONER'S DIRECT APPEAL, FAILED TO COMPARE PETITIONER'S CASE WITH OTHER FLORIDA CAPITAL CASES.

Petitioner admits that the Florida Supreme Court examines each death penalty case in relation to the others which were previously decided, but he asks this Court to review the decision of the Florida Supreme Court below because this Court's interests must be "triggered" by the failure of the Florida court to examine what proportionality review it, in fact, conducts. (Petition, at p. 6) Several cases in which police officers were victims, are recounted by petitioner to buttress his claim. He contends, not that the facts of the other cases show that the death penalty was inappropriate here, but rather that the Florida Supreme Court did not discuss proportionality review in the large majority of these cases.

In Messer v. State, 439 So.2d 875 (Fla. 1983), the Florida Supreme Court stated:

> In support of this argument [proportionality] petitioner points out that in approving his death sentence, this court did not specifically compare his case with other death penalty cases. We find this argument to be without merit. We have previously expressly held that "our review process is to ensure relative proportionality among death sentences which have been approved statewide." And that we must "compare the case under review with all past capital cases to determine whether or not the punishment is too great." Brown v. Wainwright, 392 So.2d 1331 (Fla. 1981). We reject the assertion that in our written opinion we must explicitly compare each death sentence with past capital cases.

Id. at 879.

It is this silence on proportionality which leads petitioner to allege that the Florida Supreme Court's review on this issue is "unchanneled." (Petition, at p. 6)

In Proffitt v. Florida, supra, this Court expressly approved the method by which the Florida Supreme Court reviews each death penalty case for proportionality. See also Barclay v. Florida, ___U.S.___(1983) 77 L.Ed.2d 1134. This case is therefore distinguishable from Pulley v. Harris, cert.granted, ___U.S.

____, 51 U.S.L.W. 3684, Case No. 82-1095, because the issue in Pulley concerns whether proportionality review is constitutionally required.

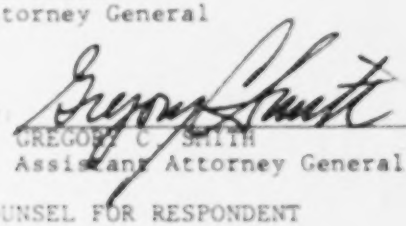
As a result of the foregoing, petitioner has failed in his attempt to demonstrate that the Florida Supreme Court violated petitioner's constitutionally protected rights when it affirmed his conviction and sentence of death.

CONCLUSION

For the above and foregoing reasons, petitioner's petition for writ of certiorari should be denied.

Respectfully submitted,

JIM SMITH
Attorney General

By: 
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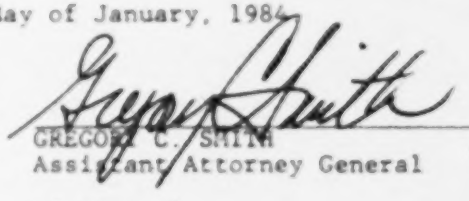
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Brief for Respondent in Opposition to Mr. P. Douglas Brinkmeyer, Assistant Public Defender, P. O. Box 671, Tallahassee, Florida 32302, by hand-delivery, this 9th day of January, 1984.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